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IN THE

Supreme Court of the United States

October Term, 1952.

No. .....

RUTH FORBES STEEN, formerly RUTH FORBES McLEOD,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on March 25, 1952.

Opinions Below.

The opinion of the District Court [R. 8-9] does not appear to have been reported except at 51-1 U. S. T. C. ¶10818. The opinion of the Court of Appeals [R. 36-39] is reported at 195 F. 2d 379.

Jurisdiction.

The judgment of the Court of Appeals was entered on March 25, 1952. [R. 39.] The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Question Presented.

Among the statutory provisions setting forth the interests included in a decedent's gross estate for federal estate tax purposes there was, during the period applicable to this estate, the following:

> (1) Joint Interests.—To the extent of the interest therein held as joint tenants by the decedent and any other person *except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth:*
>
> . . .

The sole question here is whether the exception provision set forth above in italics does or does not cover a surviving wife's original one-half share of jointly held property, where such property was acquired with earnings of the husband which were community property subject to Section 161a of the Civil Code of California.

The entire subsection of the federal estate tax law from which the part above quoted is taken is set forth in the Appendix herein, page 1.

Statutes and Regulations Involved.

The text of the statutes and regulations involved is contained in the Appendix herein.

Statement of the Case.

The facts were all precisely stipulated, and as so stipulated were found by the District Court.

Appellant is the executrix and sole distributee of the Estate of Norman A. McLeod, deceased. [R. 10.] Ap-

pellant and the decedent were married October 5, 1934, in California and resided therein until the date of the decedent's death, May 12, 1946. [R. 11-12.]

The estate tax return of said estate included jointly held property totaling $36,619.50. All of the items of that property were acquired by decedent and the appellant with funds which consisted wholly of community property and were accumulated by them as community property, as the term "community property" is used in Section 161a of the Civil Code of California; and the said funds in their entirety were derived originally from compensation for personal services actually rendered by the decedent during his said marriage to the appellant. [R. 12.]

At the time of the decedent's death said property, totaling $36,619.50, was not community property but was property held by decedent and appellant as joint tenants, as the term "joint tenants" is used in Section 811(a)(1) of the Internal Revenue Code as it read on the date of decedent's death. [R. 12.]

The district court allowed to appellant certain items not involved in this appeal, but disallowed to appellant exclusion from the gross estate of her original one-half interest in said jointly held property totaling $36,619.50. [R. 13.] The court of appeals affirmed that judgment. [R. 39.]

Specification of Errors to Be Urged.

Petitioner specifies the following error of the Court of Appeals for the Ninth Circuit:

Failure to hold that there should be excluded from the decedent's gross estate, one-half of jointly owned property included at a total of $36,619.50 and acquired with community funds.

REASONS FOR GRANTING THE WRIT.

I.

The Decision of the Court Below, in Holding Subject to the Federal Estate Tax a Surviving Wife's Original One-half Interest in Jointly Held Property Acquired With Community Funds, Is in Conflict With Decisions of This Court Holding That the Wife's Half Interest in Community Property Is an Ownership Interest.

The statute involved here expressly, and in clear words, excludes from jointly held property subject to the estate tax the interest in such property which originally belonged to the survivor and was never received or acquired by her from the decedent. (*Infra,* Appendix, p. 1.)

The funds with which the jointly held property involved here was acquired consisted of income, compensation received by the decedent for his services; and such income, it was expressly stipulated and found by the trial court herein, was "community property, as the term 'community property' is used in Section 161a of the Civil Code of California."

In *Poe v. Seaborn,* 282 U. S. 101, *Goodell v. Koch,* 282 U. S. 118, and *Hopkins v. Bacon,* 282 U. S. 122, involving income in Washington, Arizona, and Texas, respectively, this court held that the wife's interest in community property amounted to *ownership* of a one-half share in such property. In *United States v. Malcolm,* 282 U. S. 792, this court applied the same rule specifically to community property subject to Section 161a of the Civil Code of California. It is clear, then, under the decisions of this court, that one-half of community property subject to Section 161a of the Civil Code of California *belongs* to the wife. It is clear, also, that where, as here, the property was such

community property in the beginning, as earned, the wife's half interest was never received or acquired by her from the decedent.

It follows necessarily that the wife's original half interest in the jointly held property involved here originally belonged to her and was never received or acquired by her from the decedent. It would be necessary for this court to overrule the *Malcolm, Poe, Goodell,* and *Hopkins* cases, *supra,* which have stood unchallenged now for more than two decades, in order to sustain the decision rendered by the court below.

II.

To the Extent of the Reliance of the Court Below on Treasury Regulations 105, Section 81.22, Its Decision Is in Conflict With Decisions of This Court Holding That the Treasury Department Cannot Amend the Law by Regulation.

The regulation referred to, quoted in the Appendix herein, page 3, is one of a group adopted under Treasury Decision 5239 (March 10, 1943, 8 F. R. 3034, 26 C. F. R., Cum. Supp.), which attempted to establish, for the purposes of the federal estate tax, a federal rule of community property under which the earnings of the husband would be treated as his property in their entirety regardless of local law. Congress in 1942 adopted provisions having such effect, but only in relation to the following: (a) community property held as such on the earner's death—I. R. C., Sec. 811(e)(2); (b) community property transferred *inter vivos*—I. R. C., Sec. 811(d)(5); and (c) community property used in payment of life insurance premiums—I. R. C., Sec. 811(g)(4). The Treasury Department thereupon tried to round out the work of Con-

gress by extending those provisions by regulation as follows: (a) under the heading of transfers *inter vivos,* to community property divided equally between the spouses, or converted into tenancy in common, joint tenancy, or tenancy by the entirety—Reg. 105, Sec. 81-15;[1] (b) under the heading of property held in joint tenancy on the decedent's death, to community property converted into joint tenancy and so held on the decedent's death—Reg. 105, Sec. 81.22.[2] The Treasury Department also attempted to apply the same rule to such conversions for purposes of the gift tax—Reg. 108, Sec. 86.2(c).

One panel of the court below struck down the first and third of these regulations, that is, Reg. 105, Sec. 81.15, and Reg. 108, Sec. 86.2(c). (*Rickenberg v. Commissioner,* 177 F. 2d 114, certiorari denied, 338 U. S. 949, and *Commissioner v. Mills,* 183 F. 2d 32.) The court in each case held that the conversion was no transfer at all, since each spouse owned a half interest before as well as after the conversion. The decision herein below, allowing the second of these regulations, that is, Reg. 105, Sec. 81.22, to stand, was rendered by a different panel of that court, relying upon its own previous decision in *Estate of Heidt v. Commissioner,* 170 F. 2d 1021, which affirmed without opinion 8 T. C. 969.[3]

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[1] *Infra,* Appendix, p. 3.

[2] *Infra,* Appendix, p. 5.

[3] The regulation was not actually in issue in the *Heidt* case, since the property there involved, as the Tax Court opinion therein shows, was accumulated prior to the enactment of Section 161a of the Civil Code of California [*infra,* Appendix, p. 3], and was not therefore property in which the wife had a vested one-half interest.

In allowing that regulation to stand, the decision herein below stands in direct conflict with *Helvering v. Sabine Transportation Co., Inc.*, 318 U. S. 306. In that case this court stated, at page 311:

> "It remains to consider the Treasury Regulations promulgated under the 1938 Act. These forbid a credit such as that claimed in this case, calling it a 'double credit.' We think the regulations are in the teeth of the unambiguous mandate of the statute, are contradictory of its plain terms, and amount to an attempt to legislate. They cannot prevail to preclude the credit claimed."

To the same effect, *Maass, Exr. v. Higgins*, 312 U. S. 443, wherein this court, at page 447, sustained the contention of petitioner therein that the Treasury regulation there involved was "an unwarranted extension of the plain meaning of the statute."

There is no ambiguity whatever in the statutory provision involved here, I. R. C., Sec. 811(e)(1). That provision excludes from the scope of the tax the interest of the surviving joint tenant which "originally belonged" to her and was never "received or acquired" by her from the decedent. The words are simple and plain. What the regulation, Regulations 105, Sec. 81.22, attempts to do is to cut down the range of that statutory exclusion. This a regulation may not do. In sustaining the regulation the decision of the court below stands in clear conflict with the decisions of this court in the *Sabine* and *Maass* cases cited above.

III.

To the Extent of the Reliance of the Court Below on Treasury Regulations 105, Section 81.22, Its Decision Is Also in Conflict With Decisions of This Court Holding That, in the Application of a Federal Revenue Act, State Law Controls in Determining the Nature of the Legal Interest Which the Taxpayer Has in Property.

When Congress amended the estate tax law in 1942, as explained above, page 5, it made no change whatever in the provision relating to property held by the decedent and another as joint tenants at the time of the decedent's death. The number of that provision was changed from 811(e) to 811(e)(1), so as to make room for 811(e)(2), referred to above, covering property held as community property at the time of the decedent's death. But in the renumbering thus of 811(e) as 811(e)(1), not a word of its text was changed.

The Tax Court had held in respect to the former 811(e) that it had precisely the meaning contended for by petitioner here in respect to 811(e)(1). *Estate of Paul M. Vandenhoeck v. Commissioner,* 4 T. C. 125, in which the court stated, at page 137:

> "In our judgment the same result would obtain if we consider that the stock was owned and held by petitioner and the decedent as joint tenants, as contended by the respondent. Since it was purchased with community funds, one-half the consideration was furnished by petitioner; therefore, only one-half of the value thereof is includible in gross estate under section 811(e), *supra.*"

By a ruling the Commissioner expressly acquiesced in that decision. (Ruling No. 1944-24-11907, 1944 C. B. 1, 29.)

There is nothing whatever to indicate that by changing the number of the statutory provision involved from 811(e) to 811(e)(1) Congress intended its meaning to be changed.

But the Treasury Department amended the corresponding provision of its regulations, Section 81.22 of Reg. 105, to provide that:

> "where the joint tenancy or tenancy by the entirety was created by the transfer of property held as community property by such decedent and his spouse, such decedent is considered as the original owner of all of the community property so transferred, except such part thereof as may be shown to have been received as compensation for personal services rendered by his spouse or derived originally from such compensation or from such separate property of such spouse."

Whether a decedent was or was not the owner of specified property is a question governed by local law, at least where, as here, Congress did not intrude its own definition. This is the clear rule established by this court. (*Poe v. Seaborn, supra,* p. 110; *Blair v. Commissioner,* 300 U. S. 5, 9.) It was not competent for the Treasury Department to superimpose its own theory of ownership upon the law of California. This court, moreover, had already determined that the wife was the owner of a half interest in community property under Section 161a of the Civil Code of California. (*United States v. Malcolm, supra.*) It follows that in allowing Treasury Regulations 105, Section 81.22, to stand, the decision below is in conflict with the settled rule, established by this court, that in the application of a federal revenue act ownership of property is determined under the local law.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE T. ALTMAN,
Counsel for Petitioner.

APPENDIX.

Internal Revenue Code.

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * * * * * *

(e) [as amended by Section 402 of the Revenue Act of 1942, c. 619, 56 Stat. 798, which added paragraph (2), renumbered the original text as paragraph (1), and inserted a combined title for the subsection as so enlarged.]

Joint and Community Interests.

(1) *Joint Interests.*—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and

full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy, by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

(2) *Community interests* [repealed by Section 351(a) of the Revenue Act of 1948, c. 168, 62 Stat. 110.]—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

* * * * * * * * *

(26 U. S. C., 1946 ed., Sec. 811.)

Civil Code of California.

Sec. 161a. [*Interests in community property.*] The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in the community property. [Added by Stats. 1927, p. 484.]

* * * * * * * * *

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code, and in effect on the date of decedent's death.

Reg. 105, Sec. 81.15. *Transfers during life.*—The following classes of transfers made by the decedent prior to his death, whether in trust or otherwise, if not constituting bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: (1) transfers in contemplation of death (see section 81.16); (2) transfers conditioned upon the decedent's death (see section 81.17); (3) transfers under which the decedent reserved or retained (in whole or in part) the use, possession, rents, or other income or enjoyment of the transferred property, for his life, or for a period not ascertainable without reference to his death, or for a period of such duration as to evidence an intention that it should extend to his death; including also the reservation or retention of the use, possession, rents, or other income, the actual enjoyment of which was to await the termination of a transferred precedent interest or estate (see section

81.18); (4) transfers under which the decedent retained the right, either alone or in conjunction with another person or persons, to designate who should possess or enjoy the property or the income therefrom (see section 81.19); and (5) transfers under which the enjoyment of the transferred property was subject at decedent's death to a change through the exercise, either by the decedent alone or in conjunction with another person or persons, of a power to alter, amend, revoke, or terminate, or where such a power was relinquished in contemplation of decedent's death (see sections 81.20 and 81.21).

In the case of estates of decedents dying after October 21, 1942, a transfer to a third party or third parties of property held as community property by the decedent and spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered, in accordance with section 811(d)(5), as added by section 402(a) of the Revenue Act of 1942, for the purposes of this section and sections 81.16 through 81.21, inclusive, to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the spouse or derived originally from such compensation or from separate property of the spouse. The same statutory provisions apply in the case of a division of such community property between the decedent and spouse into separate property, and in the case of a transfer of any part of the community property into separate property of such spouse; in such cases, the value of the property which becomes the separate property of such spouse, with the exception stated in the preceding sentence, shall be included in the gross estate of the decedent under section 811(c) or section 811(d), if the other conditions

of taxability under such sections exist. If in the case of a decedent who died after October 21, 1942, property held as community property by such decedent and his spouse is transferred to themselves as joint tenants or as tenants by the entirety, the transfer is taxable under section 811(c), except with respect to such part of the property so transferred as is attributable to the spouse under the exception stated in the first sentence of this paragraph. With respect to the meaning of property derived originally from such compensation or from separate property of the spouse and to the identification required, see section 81.23.

Sec. 81.22 [as amended by T. D. 5239, 1943 Cum. Bull. 1081].

Property held jointly or by the entirety.—The foregoing provisions of the Internal Revenue Code extend to joint ownerships wherein the right of survivorship exists, regardless of when such ownerships were created. They specifically reach property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed toward the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. . . .

Whether the entire property, or only a part, or none of it, enters into the make-up of the gross estate depends upon the following considerations: (1) So much of the property (whether the whole, or a part thereof) as orig-

inally belonged to the other joint owner, and which at no time in the past had been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth, forms no part of the decedent's gross estate. . . .

For the purpose of determining the taxable portion to be included in accordance with the above in the gross estate of a decedent who died after October 21, 1942, where the joint tenancy or tenancy by the entirety was created by the transfer of property held as community property by such decedent and his spouse, such decedent is considered as the original owner of all of the community property so transferred, except such part thereof as may be shown to have been received as compensation for personal services rendered by his spouse or derived originally from such compensation or from such separate property of such spouse. Thus, if in the case of a decedent who died after October 21, 1942, property held as community property by such decedent and his spouse was transferred to themselves as joint tenants or as tenants by the entirety, the entire value of such property at the time of the decedent's death is includible in his gross estate, with the exception stated in the preceding sentence. With respect to the meaning of property derived originally from such compensation or from separate property of the spouse and to the identification required, see section 81.23.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 115

RUTH FORBES STEEN, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusion of law of the District Court (R. 9-14) are not officially reported. The opinion of the Court of Appeals (R. 36-39) is reported at 195 F. 2d 379.

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1952. (R. 40.) A petition for a writ of certiorari was filed on June 10, 1952.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that the entire value of the property held in joint tenancy by the taxayer and the decedent originally acquired as community property was includible in the decedent's gross estate under Section 811(e) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The pertinent parts of the statute and Regulations are set forth in the Appendix, *infra,* pp. 10-16.

STATEMENT

This case involves an asserted overpayment of estate tax. The facts as stipulated by the parties R. 3-5), and as found by the District Court (R. 10-12) may be summarized as follows:

The decedent, Norman A. McLeod, and Ruth Forbes (now Ruth Forbes Steen) were married October 5, 1934. At all time subsequent to their marriage they resided in the State of California until the decedent's death on May 12, 1946. (R. 11-12.)

The decedent's widow, hereinafter referred to as the taxpayer, is the duly appointed and qualified executrix of his estate and its sole distributee. She filed, as executrix, a federal estate tax return for his estate on November 15, 1946. (R. 10.)

Included in the estate tax return of the decedent was jointly owned property valued at $36,619.50. All of that property was acquired by the decedent and the taxpayer with funds which consisted entirely of community property, as the term "community property" is used in Section 161 of the Civil Code of California. These funds in their entirety were derived originally from compensation for personal services actually rendered by the decedent during his marriage to the taxpayer. (R. 12.)

On the basis of the foregoing, the District Court sustained the Commissioner of Internal Revenue's determination that all of the property held in joint tenancy by the decedent and the taxpayer at the date of the decedent's death was includible in the decedent's gross estate for the purpose of the federal estate tax. (R. 13.) The Court of Appeals affirmed the District Court and held that the entire value of the jointly-held property at the time of his death was includible in decedent's gross estate. (R. 38.)

ARGUMENT

1. In determining that the entire value of the property was includible in decedent's gross estate, the Court of Appeals correctly applied the provisions of Section 811(e) of the Internal Revenue Code (Appendix, *infra*, pp. 10-11). It is clear that paragraph (1) of this section requires the inclusion in a decedent's gross estate of the en-

tire value of property held in joint tenancy by the decedent and another except such part thereof as may be shown to have "originally belonged to" such other person, in this case the taxpayer. By virtue of paragraph (2) of this section (added by Section 402(b) of the Revenue Act of 1942, c. 619, 56 Stat. 798,[1] and repealed by Section 351(a) of the Revenue Act of 1948, c. 168, 62 Stat. 110), effective as to decedents dying after October 21, 1942, and on or before December 31, 1947,[2] community property is treated as belonging entirely to the decedent, except that an exclusion is provided for such part as is shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived from his or her separate property. (Appendix, *infra*, pp. 12-16.) Since paragraph (2) provides the extent to which the surviving

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[1] Section 402(b) of the 1942 Act, which became effective October 21, 1942, amended Section 811(e) by changing the title of subsection (e) from "Joint Interests" to "Joint and Community Interests", by numbering as paragraph (1) the prior provisions of the statute relating to joint interests, and by adding paragraph (2) relating to community interests. The constitutionality of paragraph (2) was sustained in *Fernandez* v. *Wiener*, 326 U.S. 340; *United States* v. *Rompel*, 326 U.S. 367.

[2] Upon the repeal of paragraph (2) of Section 811(e) by Section 351(a) of the 1948 Act, Section 81.22 of Treasury Regulations 105 (Appendix, *infra*, pp. 12-16) was amended so that the applicable provisions now apply to decedents dying after October 21, 1942, and on or before December 31, 1947.

spouse's ownership in community property will be recognized for estate tax purposes as to decedents dying between October 21, 1942, and December 31, 1947, it necessarily follows that the exclusion provided in paragraph (1) for property which "originally belonged to" the surviving spouse means, in the case of joint tenancies created with community funds, such part of the community property as is recognized by paragraph (2) as belonging to the surviving spouse. Congressional intent requires such an interpretation since the reports of the pertinent Committees of the Congress specifically state that the purpose of the 1942 amendments to Section 811(e) was to eliminate special estate tax privileges enjoyed by residents of community property jurisdictions. Report of the Committee on Ways and Means (H. Rep. No. 2333, 77th Cong., 2d Sess., p. 160 (1942-2 Cum. Bull. 372, 489)) and of the Committee on Finance (S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 231-232 (1942-2 Cum. Bull. 504, 673-674)). Accordingly, the exclusion in Section 811(e)(1) of that part of property held in joint tenancy which "originally belonged to" the surviving spouse includes, in a case where the joint tenancy was created with community property and the decedent died between October 21, 1942, and December 31, 1947, as here, only that part of the value of the jointly-held property which was received as compensation for personal services

actually rendered by the surviving spouse or derived from that spouse's separate property. In the instant case, it is undisputed that no part of the value of the jointly-held property was derived from compensation for personal services rendered by the taxpayer or from her separate property. Thus the court below correctly affirmed the decision of the District Court when it held that the entire value of the jointly-held property was includible in decedent's gross estate under Section 811 (e)(1) of the Code.

2. There are no conflicting decisions requiring resolution by this Court. Taxpayer claims that *Poe* v. *Seaborn,* 282 U.S. 101; *Goodell* v. *Koch,* 282 U.S. 118; *Hopkins* v. *Bacon,* 282 U.S. 122; and *United States* v. *Malcolm,* 282 U.S. 792, are opposed to the decision below. (Pet. 4-5.) That line of cases undertook to interpret the provisions of Sections 210(a) and 211(a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, and Sections 11 and 12 of the Revenue Act of 1928, c. 852, 45 Stat. 791, which laid a tax "upon the net income of every individual", and in them this Court held that in community property states the wife has such an interest in the community income that she should separately report and pay the tax on one-half of it. The aforementioned cases in no way imply that Congress could not provide, as it has done in Section 811(e)(1) and (2), that the entire property held in joint tenancy or as community property

is subject to an estate tax on the decedent's death. The taxpayer, accordingly, is mistaken in asserting a conflict between the decision below and the *Poe, Goodell, Hopkins,* and *Malcolm* cases, as a basis for seeking review in this Court.

Also, in upholding the pertinent Treasury Regulations (Section 81.22 of Regulations 105, as amended) (Appendix, *infra,* pp. 12-16)), the decision of the Court of Appeals (R. 39),[3] notwithstanding the argument of the taxpayer to the contrary (Pet. 5-7), in no way conflicts with decisions of this Court. Section 81.22 provides that in cases of the type here involved—

> such decedent is considered as the original owner of all of the community property so transferred, except such part thereof as may be shown to have been received as compensation for personal services rendered by his spouse or derived originally from such compensation or from such separate property of such spouse.

Thus the Regulations are plainly consistent with the statute and congressional intent and constitute a valid and reasonable construction of Section 811(e)(1) of the Code as applicable to the factual situation involved. Under such circumstances the

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[3] Section 81.22 was also explicitly approved by the Tax Court in *Estate of Heidt* v. *Commissioner,* 8 T.C. 969, affirmed, *per curiam,* 170 F. 2d 1021 (C.A. 9th).

Regulations were correctly sustained by the Court below. *Commissioner* v. *South Texas Co.,* 333 U.S. 496, 501.

Further, the decision of the court below does not, as the taxayer asserts (Pet. 8-9), conflict with decisions of this Court holding that in the application of a Federal Revenue Act, state law controls in determining the nature of the legal interest which the taxpayer has in property. Here Section 811(e)(1) and (2) of the Code does not undertake to alter the rights of husband and wife in community property nor does it proceed from a disregard of the existence of those rights. As the reports, referred to above, of the Committee on Ways and Means and the Committee on Finance indicate, the statute merely "establishes a uniform Federal rule for apportioning the respective contributions of the spouses regardless of varying local rules of apportionment." As this Court held in *Fernandez* v. *Wiener,* 326 U.S. 340, and *United States* v. *Rompel,* 326 U.S. 367, sustaining the constitutionality of paragraph (2) of Section 811(e), the estate tax is an excise tax upon the shifting at death of the incidents of property, regardless of their origin, and does not depend for its operation upon any presumption that the entire community property is owned or economically attributable to the spouse first to die.

Finally, any importance which the case might otherwise have is minimized by the fact that the

particular sections of the Code in issue have been amended so that their applicability is limited to the approximate five-year period ending December 31, 1947.

CONCLUSION

The decision below is correct; there is no conflict of decisions; and the issue in the case is of limited applicability. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

ELLIS N. SLACK,
Acting Assistant Attorney General.

ROBERT N. ANDERSON,
JOHN J. KELLEY, JR.,
Special Assistants to the Attorney General.

JULY, 1952.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * * * *

(e) [as amended by Section 402 of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Joint and Community Interests.*

(1) *Joint interests.*—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full

consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

(2) *Community interests*—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

* * * * * * *

(26 U. S. C. 1946 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

SEC. 81.22 [as amended by T. D. 5239, 1943 Cum. Bull. 1081, and T. D. 5699, 1949-1 Cum. Bull. 181.]

Property held jointly or by the entirety.—The foregoing provisions of the Internal Revenue Code extend to joint ownerships wherein the right of survivorship exists, regardless of when such ownerships were created. They specificially reach property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed toward the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. Section 811(e) applies to all classes of property, whether real or personal, in case the survivor takes the entire interest therein by right of survivorship and no interest therein forms as part of the decedent's estate for purposes of administration. It has no reference to property held by the decedent and any other person or persons as tenants in common.

The entire property is prima facie a part of the decedent's gross estate. But it is not the intent of the statute that there should be so included a greater part or proportion thereof than is represented by an outlay of funds, which, in the first instance, were decedent's own, or more than a fractional part equal to that of the other joint owner should neither have parted with any consideration in its acquirement. Facts, which in a given case bring it within any one of the exceptions enumerated in the statute, may be submitted by the executor.

Whether the entire property, or only a part, or none of it, enters into the make-up of the gross estate depends upon the following considerations: (1) So much of the property (whether the whole, or a part thereof) as originally belonged to the other joint owner, and which at no time in the past had been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth, forms no part of the decedent's gross estate. (2) If the facts are otherwise the same as in (1), but the decedent paid to such other joint owner a consideration for the interest by him (the decedent) acquired in the property, then such portion of the property, proportionate to the consideration so paid, constitutes a part of the gross estate. (3) If the property, or a part thereof, or a part of the consideration wherewith it was acquired, had at

any time been acquired by the other joint owner from the decedent as a gift, or for less than an adequate and full consideration in money or money's worth, then such portion of the entire property, proportionate to the consideration, if any, which in the first instance was paid from such other joint owner's own funds, forms no part of the gross estate. (4) If the property was acquired by the decedent and his or her surviving spouse as tenants by the entirety by gift, bequest, devise, or inheritance, then only one-half of the property becomes a part of the gross estate. (5) If the property was acquired by the decedent and the other joint owner as joint tenants by gift, bequest, devise, or inheritance, and their interests are not otherwise specified or fixed by law, then only one-half of the property is a part of the gross estate; or, if so acquired by the decedent and two or more persons, and the interests of the several joint tenants are not otherwise determinable, then the decedent and the other joint tenants surviving him shall be deemed the owners of equal fractional parts, and one only of such fractional parts is to be included in the gross estate.

The following are given as illustrative: (a) If the decedent furnished the entire purchase price, the entire property should be included in the gross estate; (b) if the decedent furnished a part only of the purchase price, only a corresponding portion of the property should be so included; (c) if

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31, 1947, where the joint tenancy or tenancy by the entirety was created by the transfer of property held as community property by such decedent and his spouse, such decedent is considered as the original owner of all of the community property so transferred, except such part thereof as may be shown to have been received as compensation for personal services rendered by his spouse or derived originally from such compensation or from such separate property of such spouse. Thus, if in the case of a decedent who died after October 21, 1942, and on or before December 31, 1947, property held as community property by such decedent and his spouse was transferred to themselves as joint tenants or as tenants by the entirety, the entire value of such property at the time of the decedent's death is includible in his gross estate, with the exception stated in the preceding sentence. With respect to the meaning of property derived originally from such compensation or from separate property of the spouse and to the identification required, see section 81.23.

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IN THE

Supreme Court of the United States

October Term, 1952
No. 115.

RUTH FORBES STEEN, formerly RUTH FORBES McLEOD,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

I.

Respondent, beginning at the bottom of page 4 of his brief, contends that paragraph 811(e)(2) of I. R. C. provides the extent to which the surviving spouse's ownership in community property will be recognized for estate tax purposes. If he is referring to property held as community property at the time of the decedent's death, he is correct. If he means, however, that paragraph 811(e)(2) refers to property held as community property at any time during the decedent's life,—and therefore to community property converted into jointly held property during the decedent's life,—he is in clear error. Paragraph 811(e)(2) refers only to community property held as such at the time of the decedent's death.

The statute itself is clear in that respect. As shown on pages 10-11 of respondent's brief, the statute prescribes that the gross estate of the decedent is to be determined by including the value, "at the time of his death," of specified property, including, under paragraph 811(e)(1), the interest "held" as joint tenants by the decedent and any other person, and, under paragraph 811(e)(2), the interest "held" as community property by the decedent and his surviving spouse. The reference in either paragraph is not to such property transferred during the decedent's life, or converted to any other form of tenancy during the decedent's life, but only to property so *held* by the decedent; and the value of such property to be included is the value thereof *at the time of the decedent's death.* Clearly, 811(e)(1) relates only to property held in joint tenancy at the time of decedent's death, and 811(e)(2) relates only to property held as community property at the time of the decedent's death.

So this court understood those paragraphs in *Fernandez v. Wiener,* 326 U. S. 340. In reference to paragraph 811(e)(1) this court there, at page 354, quoted from *Griswold v. Helvering,* 290 U. S. 56, 58, as follows:

> "'Under the statute the death of decedent is the event in respect of which the tax is laid. It is the existence of the joint tenancy *at that time* and not its creation at an earlier date which furnishes the basis of the tax.'" (Italics added.)

Correspondingly, in reference to paragraph 811(e)(2) this court in the *Fernandez* case stated, at page 358:

> "As the tax is upon the surrender of old incidents of property by the decedent and the acquisition of new by the survivor, it is appropriately measured by

> the value of the property to which these incidents attach. . . . While it may generally be true, as appellees argue, that neither the husband nor wife gains any over-all financial advantage *when the other dies,* it suffices that the decedent loses and the survivor acquires, with respect to the property taxed, substantial rights of enjoyment and control which may be of value. . . ." (Italics added.)

It was, as respondent himself points out (Br. p. 8), upon this shifting *at death* of the incidents of community property that this court in the *Fernandez* case sustained the validity of paragraph 811(e)(2). Thus, just as paragraph 811(e)(1) relates only to property held as jointly held property at the time of the decedent's death, so 811(e)(2) relates only to property held as community property at the time of the decedent's death. Neither paragraph relates to property covered by the other.

There is not a word to the contrary in the reports of the Congressional committees cited by respondent (Br. p. 5). In fact, those very reports (shown in full text in the appendix herein insofar as they relate to the statutory provisions considered here) make the separateness of paragraphs 811(e)(1) and 811(e)(2) clear. We refer to the part reading, in the House Committee report:

> "A new paragraph (2) is added after the existing paragraph dealing with *joint estates and estates by the entirety,* which is now made paragraph (1). Paragraph (2), relating to *community property of husband and wife,* provides . . ." (Italics added),

and in the Senate Committee report:

> "A new paragraph (2) is added to section 811(e) after the existing paragraph dealing with

joint estates and estates by the entirety, which is now made paragraph (1). Such paragraph (2), relating to community property of husband and wife, provides . . ."

Not that reference to the committee reports is necessary here. As stated in the argument contained in the petition, page 7, the wording of paragraph 811(e)(1), the only paragraph involved here, is plain and simple. The attempt of respondent to graft 811(e)(2) onto 811(e)(1) by way of interpretation has no warrant whatever.

II.

On page 8 of his brief respondent quotes out of context a part of a sentence from the committee reports. A reading of the full text, given in the appendix herein, shows that the words "varying local rules of apportionment" refer to the variations among the different community property states. Those words do not, as respondent attempts to imply, refer to variations between the community and non-community states. Nor do they, as respondent also attempts to imply, refer to both paragraph 811(e)(1) and paragraph 811(e)(2). They refer only to 811(e)(2), and have no reference whatever to the provision involved here, 811(e)(1). The reports quoted from are unmistakably clear in that respect.

III.

In his final paragraph, beginning on page 8 of his brief, respondent contends that the case is of slight importance because paragraph 811(e)(2) has been repealed. But paragraph 811(e)(1), the only paragraph which is pertinent here, is still in effect. Not a single word of it has been changed.

Moreover, during the five-year period ended December 31, 1947, the period during which paragraph 811(e)(2) was in effect, there were some 15,000 estate tax returns filed in the community property states.* There may still be a larger number of them, involving the question here presented, open on determinations of deficiency, claims for refund, suits in district courts, et cetera. Just how many only respondent knows.

Lastly, the issues presented here are not the subject of statutory change. The chief issue here is whether the Treasury, in applying a revenue measure, can, by regulation, and without the support of any pertinent Congressional enactment, disregard local rules of property law in determining the ownership of property. That is an issue not limited to any period.

Respectfully submitted,

GEORGE T. ALTMAN,

Counsel for Petitioner.

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*See "Statistics of Income," 1944, Part 1, pp. 304-307.

APPENDIX.

House of Representatives Report No. 2333, 77th Congress, First Session, July 14, 1942, on the Revenue Act of 1942, as reported in 1942-2 C. B. 372; excerpt from p. 489:

SECTION 402. COMMUNITY INTERESTS.

This section eliminates special estate tax privileges enjoyed by residents of community property jurisdictions by amending section 811(e) of the Internal Revenue Code. A new paragraph (2) is added after the existing paragraph dealing with joint estates and estates by the entirety, which is now made paragraph (1). Paragraph (2), relating to community property of husband and wife, provides that such property is includible in the gross estate with the exception of such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. The amendment thus makes due provision for the exclusion from the gross estate of that portion of the community property which is economically attributable to the survivor, subject, however, to the provision that in no case shall the value of the property included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition. Property "derived originally from" compensation or from separate property of the surviving spouse includes (1) property acquired in exchange for property received as compensation or in exchange for separate property, (2) community income yielded by such property and property acquired with such income, and (3) property which may

be traced back to property received as compensation, separate property, income from property received as compensation, or income from separate property. The statute establishes a uniform Federal rule for apportioning the respective contributions of the spouses regardless of varying local rules of apportionment. State presumptions are therefore not operative against the Commissioner.

Senate Report No. 1631, 77th Congress, Second Session, October 2, 1942, as reported in 1942-2 C. B. 504; excerpt from pp. 673-674:

SECTION 402. COMMUNITY INTERESTS.

This section, which corresponds to section 402 of the bill passed by the House, eliminates special estate tax privileges enjoyed by virtue of the community property system. The corresponding section of the House bill amended only section 811(e) of the Code, relating to joint interests. Your committee bill adds an amendment to section 811(d), relating to revocable transfers. A new paragraph (5) is added to section 811(d), providing that for the purposes of section 811(c) and (d), a transfer of property held as community property by the decedent and surviving spouse shall be considered to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. A new paragraph (2) is added to section 811(e) after the existing paragraph dealing with joint estates and estates by the entirety, which is now made paragraph (1). Such paragraph (2), relating to community property of husband

and wife, provides that such property i[s] y is includible in the gross estate with the exception of such p[art] h part thereof as may be shown to have been received as com[pensation] ompensation for personal services actually rendered by the [surviving spouse] the surviving spouse or derived originally from such comp[ensation] ompensation or from separate property of the surviving spo[use] spouse.

The amendments thus make due pro[vision] provision for the exclusion from the gross estate of that p[ortion] t portion of the community property which is economically [attributable] lly attributable to the survivor. Section 811(e)(2), however[,] ever, is subject to the provision that in no case shall the val[ue] value of the property included in the gross estate of the dec[edent] decedent be less than the value of such part of the communi[ty] unity property as was subject to the decedent's power of tes[tamentary] testamentary disposition. Property "derived originally fr[om]" from" compensation or from separate property of the su[rviving] surviving spouse includes (1) property acquired in exch[ange] xchange for property received as compensation or in exch[ange] xchange for separate property, (2) community income yielde[d] elded by such property and property acquired with such incom[e] ncome, and (3) property which may be traced back to pr[operty] property received as compensation, separate property, incom[e] ncome from property received as compensation, or income fr[om] e from separate property. The statute establishes a uniform Federal rule for apportioning the respective contributions of the spouses regardless of varying local rules of ap[portionment]. State presumptions are therefore not operative against the Commissioner.